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COPYRIGHT IN THE EDITING OF MUSIC

by

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Purpose of the Study

The purpose of this study is to determine whether the Copyright Office should change its rule that the mere editing of music is not provided for in the Copyright Act. The rule has not only cast a doubt upon the copyrightability of such editing but has resulted in the rejection of applications for the registration of copyright claims to the editing of music. The conclusion that will be reached in this study is that the rule and the practice of the Office under the rule have no sanction in law. It will be shown that the rule should be removed from the Office regulations and that claims to editing, in whatever legible and visible form, should be registered for the following principal reasons:

1. Editing is the writing of an author which promotes the progress of science and the useful arts.

2. Editing of music is the result of creative intellectual labor which produces a visible expression of the ideas in the mind of an author in regard to interpretation, direction and instruction in the study or rendition of a musical composition.

3. There is nothing in the Copyright Act or the cases interpreting it requiring the exclusion of editing of music from copyright.

History of the Copyright Office practice in regard to the editing of music

Musical composition as a distinct class of work subject to copyright was specifically provided for the first time under our law in the Act of 1831. At no time, however, did any act mention in precise terms that species of work which the Copyright Office recognizes in its rule as mere editing of music which is "not provided for in the Copyright Act". Section 6 of the present Act of 1909, however, does provide for copyright in arrangements and other new versions of musical compositions. Examination of the Office records discloses that copyright claims to edited music were registered prior to the Act of 1909, but Section 6, in conjunction with other sections of that Act, placed the Office in a better position to justify registrations made after the Act went into effect, July 1, 1909. It was not until 1927 that the rule rejecting editing of music as copyrightable matter was first published.

A general survey of the Copyright Office files of the decade immediately preceding 1927 shows that on numerous occasions a considerable amount of controversial correspondence on the question of editing of music was engaged in between the Office and applicants, in the main large publishers of music. The then Register of Copyrights, Mr. Thorvald Solberg, was of the opinion that copyright could not be obtained for that class of work and in 1927 he amended the Office rules and regulations

to include the statement that, "Mere transpositions into different keys, 'editing', 'fingering', or 'phrasing' [of music], are not provided for in the Copyright Act",/ After the amendment became effective, however, applications for registration of copyright claims to edited musical compositions were accepted if they contained in substance the following limitation of claim: "Copyright is not claimed in the original composition, and the exclusive right of public performance is not claimed for this edition, but copyright is based on new matter by John Doe, namely, his interpretation represented in the legible notation thereof contained in the copies". During the period of the next ten years this form of application seems to have been used for edited musical works.

C. O. Bull. No. 15 (1927) Rule 10.

Col. Clement L. Bouvé became Register of Copyrights in 1936. Within a year he reopened the whole problem and after a thorough examination of the practice and the rules of the Office, particularly during the period of the previous twenty years, he concluded that registration of copyright claims to editing could not be made even though the limitation of claim mentioned in the preceding paragraph was used in the application. Accordingly, and no doubt to fortify the position he was taking, he reworded the amendment of 1927 so that it read in 1938 as follows: "Registration may also be made under this section [Section 6 of the Act] of 'works republished with new matter', but this does not include mere 'editing', 'fingering',

or 'phrasing', [of music], which are not provided for in the Copyright Act," 37 CFR 201.4 (b) (5). /Throughout Col. Bouvé's administration, until he left Office at the end of 1943, he consistently adhered to this rule and refused to register both original and renewal copyright claims to the editing of music.

Mr. Sam B. Warner, the present Register of Copyrights, however, amended the rule so as to permit the registration of renewal copyright claims based on editing. The amendment reads: "Renewal copyright registration of a musical work will be made when the application for the original registration used the word 'editing', or some similar term to describe the copyright matter," 37 CFR Cum. Supp. 201.4 (b) (5).

The future policy to be followed concerning the registration of original claims to copyright in edited musical compositions has been studied for some time. The present paper has therefore as its purpose the discussion of the problem resulting from such study.

Applicable Constitutional and Statutory Provisions

Article I, Section 8, of the Constitution of the United States provides that Congress shall have the power to promote the progress of science and the useful arts, by securing for limited times to authors the exclusive right to their writings.

The Copyright Act of 1790 was enacted by the First Congress. This Act and all later Acts, until the present Act of

1909, provided specifically the various classes of works in which copyright might be had. In other words, only certain writings were copyrightable. Section 4 of the present Act, however, provides "That the works for which copyright may be secured ...shall include all the writings of an author." [Emphasis supplied]. It is true that Section 5 of the same Act lists thirteen general categories of works in which copyright can be claimed, but Congress only included those classes of works "for the convenience of the Copyright Office and those applying for copyrights", as it stated in its committee report on the bill enacting the law of 1909. [H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 10]. Congress, realizing the possibility that in the administration of the Act registrations might be held to the specific classes named, added the following proviso to Section 5 so that there could be no doubt as to its intention: "That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act."

The need of an authoritative and all inclusive definition of the term editing

The term "editing" is not reserved for exclusive use in the field of literature though an examination of almost any dictionary might lead one to such conclusion. It is usually mentioned only in connection with the revision, correction,

selection, arrangement, annotation, etc., of text matter for publication. In journalism it refers to the work of the editor who superintends the publication of the paper, and directs its editorial policies.

Editing, however, extends to other fields and as such is little known save to those whom it directly concerns. In motion picture production after all the scenes have been recorded on film and the work of the scenario writer, the director, the actors and others has been completed, one of the most important jobs is yet to be performed, that of the editor. The procedure followed in the editing of a motion picture is a factor which determines the extent of a film's success. A motion picture editor who does nothing more than cut out certain portions of a film nevertheless is editing the film, for that term also includes the act of modifying by excisions, curtailment, or the like. One can also edit a work of sculpture. As applied to the production of bronze statuary, the term has been used to designate the work of the founder who casts the statuary from the clay model made by the artist. The editing of a map is one phase of the work in the art of cartography. Few, if any, worth while maps reach their final printed stage until they have been carefully edited by one skilled and experienced in the art.

In recent centuries there has developed the application of a form of editing to music. The editing of music is peculiar to its own needs, differing considerably from the form

of editing generally found in literature, and definitely unlike the editing of motion pictures, maps and sculpture.

What then is editing of music? Briefly, the editor attempts, by use of text or symbols, to show dynamics, fingering, phrasing, bowing and the like, so that he can explain or instruct how the music is to be played. He makes no changes in the musical composition, except a rare correction of a note erroneously misplaced or omitted by the composer. A true editor clarifies by his experience, skill and labor the original work of the composer. The thoughts of the editor are expressed in writing when he places symbols in juxtaposition to the musical notation or adds text matter to the composition, such as annotations or prefatory statements. When the editor, however, actually adds new music, such as arrangement, he is, in addition to being an editor, also a composer of music.

Copyright in editing of music never an issue in the federal courts

A review of the copyright cases which have arisen before the United States courts has not disclosed that there has ever been a determination of the question whether phrasing, fingering, bowing, pedaling and other forms of editing of music constitute the copyrightable writing of an author. There is one English case, Boosey v. Whight [1899] 1 Ch. 836; [1900] 1 Ch. 122, which deserves thorough consideration.

Boosey & Co., the plaintiffs, were the proprietors of the copyright in the musical compositions alledgedly infringed. Boosey contended that the infringement by the defendant, Whight, consisted in the sale of perforated sheets of paper for use in an instrument called the "Aeolian", which externally bore a considerable resemblance to a piano, but was a wind instrument worked mechanically, and furnished with stops, swells, and pedals, by means of which changes in time and expression were effected. These sheets were made in the form of rolls, and when placed in the instrument were unrolled by its action. They were so prepared that whenever a perforation passed under a particular pipe and reed the appropriate note was sounded. At the beginning of each roll was printed a statement as to the key in which the piece of music was written. The rolls contained no indications of any change of key which might occur. There were, however, printed on some of them, though not on all, certain words which were found in the sheets of music published by the plaintiffs, such as andante, moderato, piano, crescendo, indicating the pace and expression at and with which the music ought to be played. These words were visible to the player, and were intended for his guidance. If one of these rolls were introduced into the instrument, the music would in ordinary course be produced at the same pace and with the same degree of loudness; these were altered by the use of the stops; and the skill of the player mainly consisted

in availing himself of these aids so as to produce the best effect.

The plaintiffs contended that the perforated sheets infringed their copyrighted sheets of music under the provisions of the Copyright Act of 1842, in that the recording of music by means of perforations was as much a copy as if it had been done by ordinary notation and that the notes of the music could be written out in ordinary notation from the perforations. They pointed out the courts had recognized copies may be made by methods other than printing, such as lithography, typewriting, shorthand and "by the system of a notation employed for the blind". The plaintiffs said it was immaterial whether the agency which intervenes between the perforated rolls and the sound was human or mechanical. They contended that "The protection of the Act of 1842 extends to every record which is capable of being translated into sound; it is not necessary that it should appeal directly to the human intelligence. But, assuming that to be necessary, that requirement is fulfilled here by the existence in these rolls of the directions as to time and expressions. Those words form part of the copyright in the music of the songs."

The defendants argued that: "These rolls are not intended to be used and read as records of symbols." The perforated roll was compared to a mechanical method of reproducing music such as the barrel of a musical box or hurdy-gurdy.

"The legislature only meant to include what at the date of the Act of 1842 was known as a sheet of music." It was admitted by the defendants' counsel that it was quite possible to prepare a key by which the notes corresponding to the perforations could be copied down, and, in fact, such a key had been prepared and applied to one of the pieces of music in question. Nevertheless, it was contended that the rolls were strictly part of a machine and could not be brought within the scope of the Copyright Acts. With reference to the marks of expression the defendant took the position that they were not material. "They are merely directions to the player how to manipulate the machine. The mere addition of the marks of expression to that which is not in its essence a sheet of music is not sufficient to bring it within the operation of the Act."

The trial judge, considering the arguments presented, reached the conclusion that the perforated rolls were not copies of the sheets of music under the provisions of the Act of 1842. The court, however, ruled for the plaintiffs and held that the defendants had infringed the copyrights when they printed the words indicating pace and expression upon the rolls. The Court said: "In my judgment the Act of 1842, fairly construed, does not prevent the defendants from making or selling these rolls, so far as they contain perforations. I think, however, that in adding to them words taken from the plaintiffs' music sheets, for the purpose of indicating to the player on the instrument the pace and expression at and

with which the music ought to be played, the defendants have gone beyond their rights, and that there ought to be an injunction to restrain them from so doing." Upon appeal the Court uphold the ruling that the perforated rolls were not copies of the sheets of music. Today, under the British Copyright Act of 1911 protection is extended to perforated rolls and it has been said that they are "copies" of a musical work. (Copinger on the Law of Copyright, 7th Ed., by F. E. Skone James, 1936, pg. 173).

The trial court, however was reversed in holding that the printing of the marks of expression upon the rolls constituted an infringement of the music sheets. The appellate court was of the opinion that: "The directions in the plaintiffs' sheets of music are no doubt protected by their copyright so long as they are used in connection with their musical scores. But apart from those scores the plaintiffs have no copyright in such directions. The directions are not in themselves a 'sheet of music,' nor are they a 'sheet of letterpress separately published.' Even if they were, they would be mere words, not sentences forming a literary composition in which copyright could be acquired." The court further said: "I think that no substantial part of the plaintiffs' book, that is, of their printed musical sheets, has been copied by the defendants. So far as words have been taken from the plaintiffs' book and put on the defendants' sheets, they have

no use or connected meaning by themselves, and are only of use on the defendant's sheets, in any practical point of view, as directions for working the defendants' mechanical instrument to produce musical sounds."

The opinion of the appellate court in the Boosey v. Whight case offers arguments both for and against the copyrightability of the editing of music. The court did not pass upon the copyrightability of editing, as such, but only reached the conclusion that a player piano roll was not a copy of a musical composition and that the directional markings upon the roll did not form "a literary composition", because they had "no use or connected meaning by themselves." There is still to be awaited a decision by either an English court, under the provisions of the Copyright Act of 1911, or an American court, under the provisions of the Copyright Act of 1909, which determines whether editing, when accompanied by a legible musical score, can in itself be the subject matter of copyright.

ARGUMENT: Editing of music is the writing of an author

The symbols used by editors of music have already been identified by some writers as a form of shorthand in the language of music. A use of symbols for purposes of abbreviation is not novel to music alone. The business world has long recognized the value of stenography in the efficient handling of its correspondence, just as the reporter in the legislative

chamber or court room finds it the most important tool he possesses to perform his duties. A cable code book is a well known means to enable one to say in a few words what might require several paragraphs. Yet the same thought is expressed whether the message is in code or in lengthy text. Symbols are widely used to convey ideas in mathematics, physics, chemistry, and phonetics as well as other sciences and the arts. Without the use of symbols the scientist would be at a loss to convey conveniently and clearly many of his ideas. The editor of a modern dictionary would find it most difficult to give the correct pronunciation of each word defined if he was forced to do so by explanatory text instead of the symbols which he now uses. Equally difficult would be the problem of one attempting to present his own original interpretation of how each line of a piece of poetry should be recited if he used explanatory text instead of scansion signs to distinguish the metrical feet of the verse and points of emphasis or pause.

Thus the editor of music like the scientist, the scansionist, and others has adopted a set of symbols to convey visibly and conveniently his ideas and thoughts as to how the music should be interpreted by the player. And certainly he is entitled to do so, for the composer of the music, which is edited, has himself written his thoughts in notation foreign to that of written language. Musical notes are a form of writing long recognized as a means of conveying the composer's

musical ideas.

If these editing symbols are the shorthand of the language the editor uses to express his thoughts then but one conclusion can be reached that they are the "writings" of an author; just as no one could argue successfully that a speech or work of literature transcribed by means of any system of decipherable shorthand was not a "writing". Shorthand is not only the compendious and rapid method of writing which is well known to all and by which the Office secretary can speedily take dictation by substituting characters, abbreviations, or symbols, for letters and words; but it includes also any similar system or instance of abbreviated notation.

Man's accomplishments have been as varied as the manner and means whereby he recorded them. The demotic symbols used by the ancient Egyptians are to us a strange form of writing, They developed those symbols as a simplification of their hieratic characters, those having earlier replaced the hieroglyphic, a writing composed mainly of pictures. Fantastic indeed have been some of the forms of writing used by man to convey his thoughts in lasting visible form. A reproduction of a beautifully decorated and painted panel from a temple of the Aztecs would to most people represent nothing more than a painting of some great priest whose odd features and dress are supplemented by an equally strange array of what appears to be queerly drawn birds, snakes, etc. The scholar

of Aztec civilization who could decipher each feature and color of that panel would possibly give the complete, though brief, history of the Aztec people for a particular calendar year.

The term "writing" today is not limited to the seemingly narrow scope of these illustrations; in fact, it is much broader than the usual dictionary definition or that which could have possibly been conceived in the minds of the framers of the Constitution of the United States. It would indeed be bold to state that the members of the Constitutional Convention were thoroughly conversant with the progress of science which was soon to produce the art of photography. It was impossible for those same men, save in their wildest imagination, to anticipate the invention of the motion picture which would become an important "writing" in the economic and social life of our civilization. Today, both photographs and motion pictures are classed as writings in the copyright law.

The question as to whether a photograph could be a writing came before the Supreme Court in the case of Burrow-Giles Lithographic Co., v. Napoleon Sarony, 111 U. S. 53, 58 (1884). The Court decided in the affirmative. In interpreting Art. I, Sec. 8, Cl. 8, of the Constitution the Court said: "By 'writings' in that clause is meant the literary productions of those authors, and Congress very properly has declared these to include all forms of writing, printing, engraving,

etching, etc., by which the ideas in the mind of the author are given visible expression".

Science and art ever march forward to create new means for man to express his ideas in permanent record. The Supreme Court's definition of a writing may yet be challenged if our Congress enacts into law the extension of copyright protection to the ideas of man recorded electrically upon a mere strip of wire or metal tape, in which no human eye or hand, by sight or touch, could "visibly" note the existence of any "writings". The ear alone in those cases could only have known to it the interpretive work of the performing artist by the intervention of a mechanical device. But that need not be considered here.

There appears to be no doubt, therefore, that the symbols and words used by the editor can be termed "writing" when they convey his ideas to those studying or performing the music he edits. But is such "writing" the writing of an author? Is it original and creative?

Certainly the intellectual labor of the editor which creates his instructive and interpretative writings brings his work within the Constitutional provision. In Charles M. Higgins et al. v. William D. Keuffel et al., 140 U. S. 428, 431 (1891), the Supreme Court said, referring to the clause of the Constitution under discussion, "This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor."

Weil in his "American Copyright Law" (1917, pp. 41, 42) examines numerous court decisions and concludes "that neither literary or artistic merit, even in a minor degree, is required to render a work copyrightable under the Constitution". He states originality simply means that it is the result of the intellectual labor, (that is, thought in a physio-psychological sense) of the author who has "not consciously copied or reproduced, literally or colorably, in whole, or in part, from any other work or works; that the degree of originality may be 'very moderate';" and he finally concludes, "that the Courts will deem nearly all writings, original in the sense just outlined, to be calculated to promote the progress of science and the useful arts, without even casual critical examination on the part of the Court."

ARGUMENT: Editing of music promotes the progress of science and the useful arts

Editing of music is a broad term, a complete and satisfactory definition of which is wanting as has already been indicated. It is possible for an editor to make an exhaustive study of a piece of classical music, carefully diagnosing each bar and line with lengthy explanatory text and perhaps adding for illustration comparative measures from other works, as well as prefacing the work with a biography of the composer. Usually, the editor does no more than to assist the student

or accomplished musician in properly interpreting the music as he believes the original composer intended it to be.

Many writers on the subject have pointed out the value and usefulness of music editing. An understanding of the symbols used in the editing of music was considered important as early as 1751. "The Art of Playing on the Violin", by F. Geminiani, published in that year, "contains all the Ornaments of Expression, necessary to the playing in a good taste." Thomas Jefferson's personal copy (now in the Rare Books Division of the Library of Congress) bears a notation on page 8, in his own handwriting, which demonstrates his unusual interest in the value of the editing of music. Without the assistance of the editor the student quite often would be at a loss to execute a proper performance of the work. It is evident that any such instructive information must be conveyed by means of some visible notation such as words or symbols. It could be done in every instance by explanatory text, but the player could not stop to read a sentence of instruction and at the same time the notes without the music losing all its tempo.

> "Music do I hear?
> Ha! ha! keep time:--How sour sweet music is
> When time is broke, and no proportion kept!"
> --Richard II, Act V, sc. 5.

Mother necessity blessed music editing with the development of a language of its own, a form of shorthand consisting of words and symbols to which reference has already been made. Thus the musician by translating a mere word or symbol can

quickly know the ideas of the editor which might have otherwise required a sentence or more to accomplish. Imagine what a sheet of music would look like if burdened between each line with several paragraphs of text to instruct how the measures to which they applied should be played.

It is urged, therefore, that the function of editing in the study and in the rendition of music promotes the progress of science and the useful arts. Perhaps it is too fanciful and exaggerated to suggest the work of the editor of music promotes the progress of science. But it must be admitted that whatever improves the rendition of music makes it all the more desired by the listener. The greater the demand for music the greater the need for the instrumentalities which mechanically reproduce it; and it is then that the mind of the inventor, inspired by the profits awaiting him, seeks out improvements of those instrumentalities.

The war well illustrated the use of music in improving the morale of the worker. Such promotion of the progress of science and the useful arts can only be in the sense that psychologically and physiologically, a worker's mind is said to need recreation and rest to enable future intellectual, creative effort.

ARGUMENT: The Copyright Act extends copyright to all the writings of an author

The music editor gives "visible expression" to his own ideas of interpretation, direction and instruction in the form of written symbols, whether they be marks or words. If it is agreed that the editor's work is the writing of an author, there still remains the question whether such writing can be made the subject matter of copyright. While it is true that the Copyright Act of 1909 provides that copyright may be secured for all the writings of an author, nevertheless the courts have ruled and text writers have pointed out that not all writings are copyrightable. The writing can not consist of but a single word. It must not be immoral, indecent, blasphemous, seditious, libellous, nor one where an intentional deception or false pretense is contained in the work.

Shafter in his "Musical Copyright" (2d ed. 1939, pg. 35), states that: "Before a work of any type can be copyrighted, it must possess certain necessary qualifications. These are form, quantity and quality (utility, merit, originality, good taste)."

Originality is the attribute most necessary to a writing. At the same time, absolute originality is impossible to obtain. The editor who works independently and who does not copy from another is original in the expression of his own thoughts resulting from his own labor and skill even though he appends

them to a work of an earlier author for the purpose of explaining, interpreting, etc. the earlier work. His "writing" even though original must, however, consist of some quantity. It is impossible to state a general rule to identify what is substantial and what is not. A gem of literature may be contained in a couplet of poetry or in a sentence of prose.

Drone, in his "Law of Property in Intellectual Production" (1879, Pg. 212) states: "How short a composition may be, and still be a subject of copyright when published alone, has not been definitely determined by the legislature or the courts". That statement was made in 1879 when his work was published; and an examination of later cases and works on copyright affirms it. Shafter's "Musical Copyright" (2d Ed., 1939, pp. 36, 37) comments: "Quantity is regarded as one of the qualifications on which no definite limits are, or can be, placed," and, "The quantity is immaterial as long as the 'complete idea' is expressed" (pp. 36, 37).

Before the conclusion is reached from the foregoing that editing of music is copyrightable matter and hence a claim of copyright to it is registrable in the Copyright Office, it is proper that consideration be given to arguments against copyright in editing of music.

ARGUMENT: The Copyright Act provides no classification for the editing of music and the Copyright Office rules and regulations make no provision for the registration of copyright claims to such work

Section 5 of the Copyright Act of 1909 provides, "That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:" (and immediately thereafter are listed thirteen general categories). The fact that some particular class of work is not specifically mentioned does not prevent registration, for that same section provides, "That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act". Section 4 of the Act reads: "That the works for which copyright may be secured under this Act shall include all the writings of an author."

Edited music was well known when Congress enacted the present copyright statute. If editing of music is a copyrightable writing of an author, certainly registration could not be denied for want of classification.

The Register of Copyrights is authorized to make rules and regulations for the registration of claims to copyrights, subject to the approval of the Librarian of Congress. But the very words of Section 53 of the Act granting this authority should in themselves be sufficient to remove all doubt that

Congress never intended to transfer to the Copyright Office the power specifically given it in the Constitution to legislate substantive law defining what writings of an author can be protected by copyright. The delegation of power to make rules for administrative purposes to carry into effect the provisions of a statute does not include the power to change the substantive law itself.

That Congress had no intention to give in the rule making power anything more than would be required for the Register of Copyrights to carry out his ministerial duties is clearly shown in the committee report of the House of Representatives in 1909 on the copyright bill which in the same year was enacted into law. Commenting on Section 53 of the bill the committee said: "Section 53 provides for the making of rules and regulations and does not confer upon the register any judicial functions." [H. R. Rep. No. 2222, 60th Cong., 2d Sess. (1909) 20].

Hence, it follows, that no copyright office regulation can be made which will have any sanction in law if it denies to an author any right which he possesses in his "writings" under the provisions of the Copyright Act now in force.

The rule making power given the Register of Copyrights and the Librarian of Congress under the Copyright Act must go no further than to make rules and regulations for the registration of claims to copyright, purely a matter administrative in character and no more. Weil, in his "American Copy-

right Law", 1917, p. 565, points out that: "The narrow limits of the power here conferred, viz: to make rules for the registration of claims to copyright, should be borne in mind, in reading the present Rules, some of which . . . appear to exceed the limits of the authority conferred, and to take quite an incorrect view of various sections of the law."

Congress in prior copyright acts limited copyright protection to those classes of works which it specifically named in each act. The present Act contains no such limitation for it provides that the works for which copyright may be secured shall include ALL the writings of an author.

If editing of music is the writing of an author, the present Copyright Office rule, that the "editing", "fingering" or "phrasing" of music is not provided for in the Copyright Act, is without foundation in law and absolutely in contradiction to the express provisions of the Copyright Act of 1909.

ARGUMENT: Editing of music is not creative work

It has already been stated there never has been a case before a United States court in which the point in issue was the editing of music, nor has any authority been found which holds that the editing of music cannot be creative work. It appears to be in order at this point, however, to review the cases cited by the Register of Copyrights in his forty-fourth annual report (covering the fiscal year ending June 30, 1941).

Col. Bouvé attempted in that report to justify the position which the Copyright Office had taken that the editing of music was not a new and original writing of an author. It is important to note in each of the following cases that they dealt with the question of new musical composition and not merely a new version in some other form of writing.

The earliest case cited was Jollie v. Jaques, 1 Blatchf. 618 (1850) Fed. Cas. No. 7,437. In that case the plaintiff alleged that the defendant had infringed the copyright in a musical composition entitled "Serious Family Polka", a pianoforte arrangement of an earlier German work composed for clarinet. In reviewing the facts of the case the court said that the pianoforte version based upon the German melody did not come within the scope of the Copyright Act of 1831 because, "The musical composition, 'Serious Family Polka', which was allegedly infringed, did not come within the Copyright Act of 1831 because, "The musical composition contemplated by the statute must, doubtless, be substantially a new and original work; and not a copy of a piece already produced with additions and variations, which a writer of music with experience and skill might readily make." It was further commented that: "It is not claimed that Loder [the author of "Serious Family Polka"] is the author of the melody or air; but simply by skill and labor he has adapted it to a new use, or to a new instrument, the pianoforte, for instance, instead of the

clarinet." Whatever value is attached to what the court said in the above case must be tempered by the fact that the court's words were but dictum. The court suspended the decision on the motion for injunction because the evidence on this part of the case was conflicting "and not sufficiently full to enable us to determine on which side the truth lies."

Under the present Act no court could possibly conclude that the work by Loder, if actually an arrangement, was not a new musical composition. Clearly such work is not the mere transposition of key but actually a new version for which provision is made in Section 6 of the Act. The Copyright Act of 1831 in force at the time of the infringement contained no specific provision that arrangements or other new versions of works were subject to Copyright as is now found in the present Act. The Register of Copyrights in citing this case with approval made no comment that the Copyright Act and the Rules and Regulations of the Copyright Office in force at the time of his report both provided that arrangements were new works, subject to copyright.

In Cooper v. James, 213 F. 871 (N.D. Ga., 1914), the court quoted with approval the words of Mr. Justice Nelson in Jollie v. Jacques that the musical composition contemplated by the statute must be a new and original work. But here again the editing of music did not enter the issue. The question simply was whether an alto part added to the soprano, tenor

and bass parts then in the public domain constituted new musical composition. The decision was in the negative.

Nowhere in the above mentioned cases is there any reference to the editing of music. The same is true of the remaining cases cited in Col. Bouvé's report. In Norden v. Oliver Ditson Co., Inc., 13 F. Supp. 415, 418 (D. Mass., 1936), the court quoted with approval statements from the case of Jollie v. Jaques and Cooper v. James holding that a change or adaptation of a musical composition in the public domain must result in a new and original work. In its decision the Court said: "A composition to be the subject of a copyright must have sufficient originality to make it a new work rather than a copy of the old with minor changes which any skilled musician might make. It must be the result of some original or creative work." The Court further said: "...in the instant case the plaintiff's music, being merely a copy with minor changes of music in the public domain, was not copyrightable as such."

In the case of Arnstein v. Edward B. Marks Music Corp., 11 F. Supp. 535, 536 (S.D.N.Y.,1935), the Court said: "The authorities I have examined state that a musical piece to be original, according to the usual definition applicable to a situation such as is here presented, does not necessarily mean it is an absolutely new production. For instance, a new arrangement of an old piece may be copyrighted, provided it is more than a mere copy with variations, and the same test is to be applied as in the case of patents; that is, it must indicate

an exercise of inventive genius as distinguished from mere mechanical skill or change."

The Court was correct in holding that a new version created by an author in some form of writing, such as an arrangement of a previously published musical composition, was a new work subject to copyright. The Court's analogy between copyright law and patent law, however, is open to question. The copyright law requires originality in the author's writing, but never novelty or invention. Ball, in his "Law of Copyright and Literary Property" (1944, pg. 111) states: "In fact the Register of Copyrights does not attempt to determine either the originality or novelty of a subject submitted for copyright; but the Patent Office would not be justified in issuing letters patent for an invention or discovery without making a thorough examination of the novelty of the subject for which a patent is claimed."

The foregoing cases were cited by Col. Bouvé to support the argument that the editing of music is not the original, creative and copyrightable writing of an author. But that such conclusion is soundly based, either in fact or in law, there is extreme doubt. The Copyright Office, which possesses no judicial functions, should certainly resolve the doubt in favor of the copyright claimant and let the courts decide the validity of the copyright claim when the issue arises. Such action is not only logical, but very practical; and that fact is best emphasized by Shafter in his "Musical Copyright"

(2d Ed., 1939, pp. 42, 43). He states that: "Originality has been designated to be 'alone the test of validity' [citing Fred Fisher, Inc., v. Dillingham et al., 298 F. 145 (S.D.N.Y., 1924)], but if this rule were rigidly maintained, the Copyright Office would, in all probability, be forced to return every musical application sent to it."

The form of writing identified as "editing of music" has been confused with that class of writing known as "musical composition." This possibly explains why the conclusions have been reached that editing is not creative work; that it does not bring into being new musical composition. The first conclusion is false. Editing of music can be the creative writing of an author. The second conclusion is true, in that editing of music is a different class of writing from musical composition, as will be demonstrated in the discussion of the next argument, "Editing is not musical composition."

ARGUMENT: Editing is not musical composition

It is contended by those who deny that copyright can cover the editing of music that such editing does not result in new musical composition and hence cannot be considered an adaptation, arrangement, "or other versions of works" for which copyright can be secured under Section 6 of the Copyright Act of 1909.

Editing of music is not and can hardly be new musical composition if the editor is faithful to the duty he is to

perform. He should do no more than to interpret or instruct how the musical composition should be studied and played. He can by his creative ability, skill experience and labor make extensive use of the many symbols and forms of notation which are afforded him to express his ideas as to direction, interpretation, and the like. In any event true editing does not consist of the creation of new musical composition.

Admitting that the faithful editing of music is not new musical composition, but at the same time recognizing that it is a writing resulting from the labor and skill of the editor, then can it be actually concluded, as a matter of law, that mere editing, fingering, or phrasing of music is not provided for in the Copyright Act? If editing of music is not musical composition, then what class of work is it? It is clearly in the nature of instruction and clarification which if written in the form of text matter and separately published would, without doubt, be classed as a book. It has been said that: "There is also a kind of arrangement in the case where someone provides an existing musical score with signs indicating the shading, the tempo, the phrasing, the fingering, etc. That kind of work cannot be protected as a musical production; yet the whole of such signs, added to a score, might be protected by a literary copyright, like a comment. Such work does not give to the musical work a new form, different from the original one (like an adaptation does); it does not create something new in the field of the musical art; it only aims at bringing

out a rendering which will agree with the not fully expressed will of the composer," and further that: "The notation of these signs is in the nature of a literary work, not a musical work. True, it deals with music; actually it is like a musical essay, in which a composition is analyzed and some hints for the interpretation are given; no one would consider such essay as a musical work from a legal viewpoint..." [Philipp Allfeld, in his commentary on the German copyright law, (1902, pg. 58). See bibliography for title and publisher].

It has already been argued that registration of a copyright claim to the writing of an author, coming within the provisions of the Copyright Act, could not be denied merely for want of a specific classification, and it appears as a matter of law that such reasoning is well founded. The problem of classification is mainly one of administration within the Copyright Office. In the House of Representatives Committee report (60th Cong. 2d Sess., rept. 2222) on the bill enacting the Copyright Act of 1909, the following comment was made in reference to the list of classes of works contained in the Act: "Section 5 refers solely to a classification made for the convenience of the copyright office and those applying for copyrights."

Class E, musical composition, is the logical category under which the edited work should be registered, for the purpose of practically and conveniently carrying out procedures both in the Copyright Office and the Library of Congress. But if it is held that the "editing" is a work which falls under

the broad classification of book, the applicant for registration would be required to furnish an affidavit of manufacture, provided by Section 15 of the Copyright Act. Not all literary works are books. Dramas are literary works, yet an affidavit of United States manufacture need not be furnished for dramatic compositions registered under Class D of Section 5 of the Act. The "editing" is so closely related to the music which it clarifies that anyone endeavoring to locate the facts of registration would logically examine the Music Catalog; and anyone desiring to inspect the copy would seek it where musical compositions are normally located, not where one would expect to find books. A final determination of this question of classification is not necessary for the purpose of this study.

ARGUMENT: <u>The use of the copyright notice upon works in the public domain misleads the public</u>

The Holy Bible is in the public domain under our copyright law. Anyone may make copies of it, translate it, or make any other use of it. Yet there are many editions which can be found on the shelves of book stores and libraries bearing a copyright notice. These editions probably contain some new matter, such as indices, annotations, maps and the like. Section 6 of the Act of 1909 provides: "That ... works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act." The same Act provides that to secure the copyright to the new matter when

the proprietor publishes it, all he need do is to place the correct copyright notice upon the work; the same form of notice he would have used if the work were entirely original. If there is any doubt as to the correct position of the notice (reviving the question whether the editing should be registered as Class A, book, or Class E, musical composition), the solution can be found by the placing of the notice on the title page of the work and avoiding either of the alternatives; that is, the verso of the title page in the case of a book, and the first page of music, if it be a musical composition.

It is not believed that the public is greatly mislead, as a general rule, in regard to the copyright proprietorship claimed in editions of the Bible. But what about other works in the public domain, such as Mark Twain's "Tom Sawyer", Lewis Carroll's "Alice's Adventures in Wonderland" and others? Certain editions of these works containing new matter are published today with a copyright notice. The proprietor is entitled under the provisions of the Copyright Act to do so, for the same reason as in the case of the Bible: he wants to protect the new matter he has added, be it pictorial or text. The law gives him this right. The usual copyright notice is sufficient; he need not specify in the work to what precise matter his claim is made. Granting that there are instances when this will be misleading and deter some from using the original work, yet the public is not without a means to ascertain the extent of the copyright. Comparison with the original edition or a search in the Copy-

right Office records would normally disclose this information.

How then is the situation different in the case of edited music, the original composition being in the public domain? Assuming that the editing of music is copyrightable, then there is no difference.

Col. Bouvé in his forty-fourth annual report, to which reference has already been made, gives three main reasons why the Copyright Office should not register copyright claims to edited music, when the claim is limited to "editing":

1. To make such registration would render the records contained in the Copyright Office a "crazy quilt" of claims to material which is copyrightable and material which is not and thus defeat the clear purpose of Congress in its effort to obtain an official record of claims of copyrightable matter.

2. If registration were made, the Copyright Office, as a branch of the Government of the United States, would consciously render itself a party to misleading the public.

3. If such registration were made, the public could never with security claim to have a free right of user in such classical music in the public domain.

If the editing of music is subject to protection under the provisions of the Copyright Act these reasons can offer no justification in law for the refusal of the Register of Copyrights to record a copyright claim to the editing of music. But it is in these reasons, particularly the third, that we find the cause for Col. Bouvé's sincere and untiring efforts to de-

fend what he believed an infringement upon the right of the public to use freely, without any fear whatsoever, the works in the public domain. Col. Bouvé was both a lawyer and a musician and it would indeed be unfair and unappreciative if one were to say that his opinions in regard to editing of music did not deserve thoughtful consideration. He conscientiously adhered to his views on the subject throughout his administration of the Copyright Office from 1936 to 1943, which ended a few weeks before his death.

Section 1 (e) of the Copyright Act of 1909 provides that the copyright owner has the exclusive right to perform the copyrighted work publicly for profit if it be a musical composition. The argument has been advanced that musical compositions in the public domain are edited and republished with a copyright notice, and that such notice has the effect of "scaring off" the members of the public who would want to perform the composition for profit. The same might be said if one were to translate the words of such musical compositions, or annotate one of Shakespeare's plays. Such new versions of works which are in the public domain may be published with the usual copyright notice there being no requirement that the notice also include a statement which specifies to what portion of the work the copyright claim is made.

The copyright claimant to the editing does not own anything more than that which the author of the editing has created.

It has been said that the editing of music is not musical composition. If that be true, which the arguments thus far advanced would substantiate, then Section 1 (e) does not have application.

The Copyright Office can not ignore the express provisions of the Copyright Act in order to assume the doubtful position of guardian of the rights of the public in the use of copyrighted works, particularly those in the public domain. The user of music has access to the law. He, with the advice of his legal counsel, should decide what rights the public possesses in any particular work and what rights are owned by the copyright claimant who has placed his notice upon it. More inconvenience or the inability to ascertain one's rights to the use of a work, offers no valid reason to deny the editor of music the copyright to which he may be entitled under the law. Congress has specifically provided in Section 6 of the Copyright Act of 1909 that new versions of works in the public domain or works republished with new matter "shall be regarded as new works subject to copyright under the provisions of this Act; but the publication of any such new works shall not... be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works." If the law is to be amended to remedy evils such as those suggested by Col. Bouvé, the amendments must be made through regular legislative channels and not by administrative action.

CONCLUSIONS

This study of the subject of copyright in the editing of music leads the writer to the following conclusions:

1. That the editing of music can well be the creative and original writing of an author which promotes the progress of science and the useful arts.

2. That such writing is subject to a claim of copyright under the provisions of the Copyright Act of 1909, made pursuant to Article I, Section 8, Clause 8, of the Constitution of the United States.

3. That after copyright has been secured by compliance with the provisions of the Act, the copyright proprietor is entitled, as a matter of law, to register his copyright claim in the United States Copyright Office.

4. That the Copyright Office has no judicial power to pass upon the substantive rights of a copyright proprietor and must, as provided by law, register copyright claims to works deposited in the Copyright Office under the provisions of the Act.

Conclusions (Continued)

5. That the question of classification under which copyright claims to the editing of music are to be recorded is primarily an administrative problem of the Copyright Office, the solution of which cannot invalidate or impair the copyright protection secured under the Act, nor the right of the public to use works in the public domain.

6. That the editing of music is not "musical composition" and hence the provisions of Section 1 (e) of Act have no application to such editing.

7. That the Act authorizes the use of the copyright notice upon works entitled to protection under its provisions without any requirement that the notice define the extent of the claim.

* * *

COPYRIGHT IN THE EDITING OF MUSIC

APPENDIX

I, Authorities

Pages

Cases:

Statutes (United States):

Authorities (Continued) Pages

II. BIBLIOGRAPHY ON COPYRIGHT

Allfeld, Philipp: "Kommentar zu den gesetzen vom 19. juni 1901, betreffend das urheberrecht an werken der literatur und der tonkumst und uber das verlagsrecht, sowie zu den internationalen vertragen zum schutze des urheberrechts", C. H. Beck, Munchen, 1902.

Amdur, Leon H.: "Copyright Law and Practice", Clark, Boardman & Co., Ltd., New York, 1936.

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"Copinger on the Law of Copyright", (7th ed. by F. E. Skone James) Sweet & Maxwell, Ltd., London, 1936.

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Ladas, Stephen P.: "The International Protection of Literary and Artistic Property", The Macmillan Co., New York, 1938.

MacGillivray, E. J.: "A Treatise Upon the Law of Copyright", John Murray, London, 1902.

Putnam, George Haven: "The Question of Copyright", J. P. Putnam's Sons, New York, 1896.

Richardson, J. B.: "The Law of Copyright", Jordan & Sons, Ltd., London, 1913.

Robertson, George Stuart: "The Law of Copyright", Clarendon Press, Oxford, 1912.

Shafter, Alfred M.: "Musical Copyright" (2d ed.), Callaghan and Co., Chicago, 1939.

Weil, Arthur W.: "The American Copyright Law", Callaghan and Co. Chicago, 1917.

III. ILLUSTRATIONS OF EDITED MUSIC

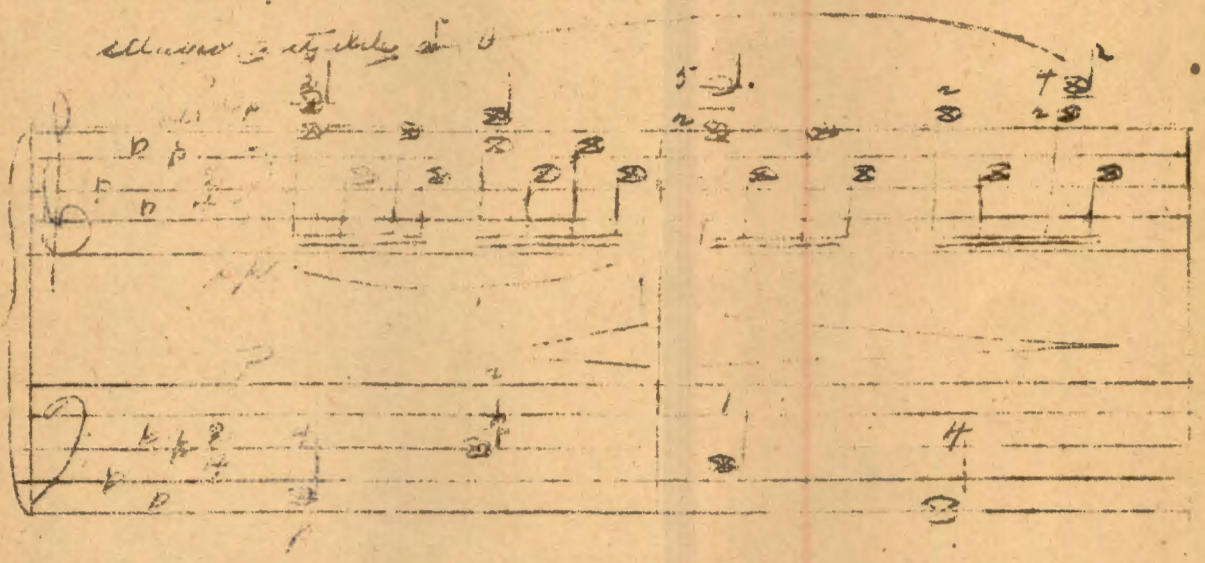
The illustrations (1) and (2) of edited music shown on the two pages following demonstrate the utter impossibility of the editor of music presenting a usable edition if he is denied the opportunity to express his thoughts in a condensed or abridged manner by the use of symbols placed in juxtaposition to the notes to which his instruction applies. This is not only true of the editor but also of the original composer who desires to include instruction as to how the music should be rendered.

It is to be noted that the text which is used as a translation of the symbols of the editor does not account for the fingering marks shown by numerals above the notes. It would be necessary, to indicate the proper fingering, to add at least an additional paragraph to each illustration.

Illustrations of Edited Music (Continued)

(1) Beethoven's "Sonate Pathétique"

In 1891 Edw. Schuberth and Co. published an edited version of Beethoven's "Sonate Pathétique" bearing a copyright notice in their name. The complete sonata consists of 596 measures, 73 measures of which formed the Adagio Cantabile. The illustration given below is the first two measures of the Adagio.



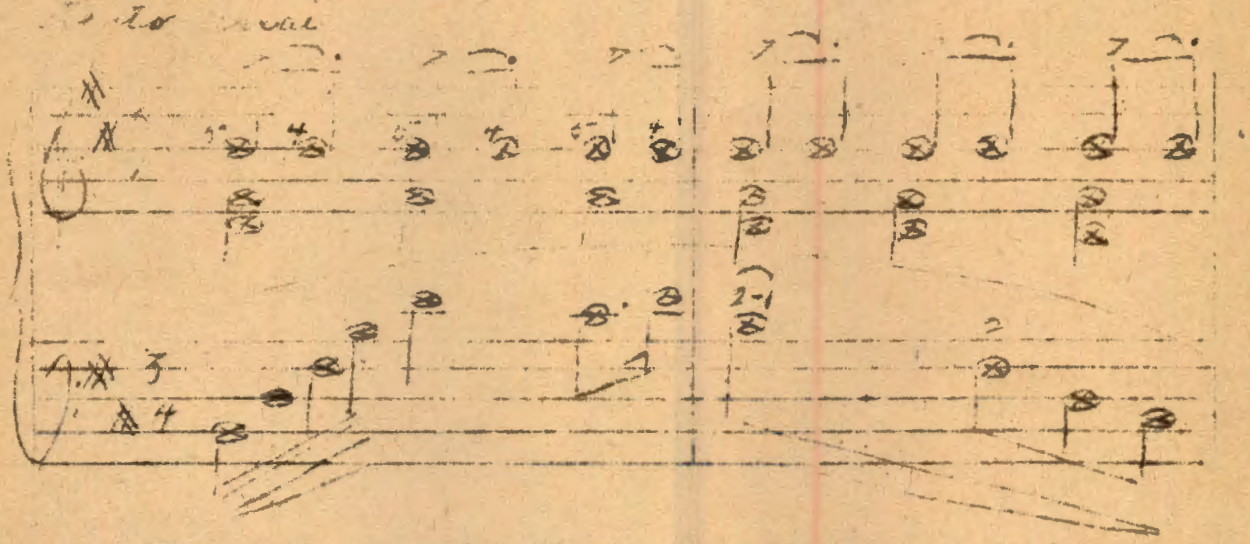
If text had been used instead of the "shorthand" symbols, an editor would be compelled to place immediately beneath these two measures a paragraph which would read somewhat as follows:

Slowly songlike. Metronome at 60, 1 beat to each eighth note. Principal Subject. The upper tones in the right hand, being the melody, must stand out distinctly against the accompaniment yet pleadingly. In the accompaniment the longer notes in the bass are played somewhat more loudly and the middle voices should be played quite softly. In the joint signs of expression, namely the crescendo, beginning with the second interval in the right hand, and the decrescendo beginning with the 1st interval in the 2nd measure and ending on the last single tone in that measure, all voices should increase and diminish in proportion.

Illustrations of Edited Music (Continued)

(2) Chopin's "Prelude No. 6, B minor"

Another illustration of edited music is one from Chopin's "Prelude No. 6, B minor" published in 1909 with a copyright notice in the name of Bote & Bock. The complete Prelude Consists of 26 measures of which the first 2 have been selected.



Here again considerable instructive text would be required by the editor in lieu of the use of his symbols well known to all musicians. He would probably be compelled to write:

Very slowly. Instructions for right hand: the chords and intervals should be slightly accented while the repeated single notes should be played more softly with a slight staccato touch. The right hand, being the accompaniment should be kept soft. Instructions for left hand: The melody beginning softly increases to a moderate crescendo then decreases. In order to preserve the perfect legato the phrase extends from the first note in 1st measure through "C" in the 2nd measure. In the 2nd measure the 2nd finger plays "B" and the 1st finger is quickly substituted that the perfect legato may not be broken.

IV. EXCERPT FROM THE WRITINGS OF AUTHORS ON SUBJECTS HAVING REFERENCE TO THE EDITING OF MUSIC

1. Music editing is a form of writing in the nature of shorthand

"Some accurate knowledge of the manifold and various stenographic signs of ornaments--graces, groppi, tremoli, tremblemens, agreméns, manieren is indispensable to the student." DANNREUTHER, MUSICAL ORNAMENTATION (3rd [n.d.] viii)

"Elaborate ornaments--the quaint "double-relish," the "elevation," for instance--are also carefully written out, note for note; but for the simpler graces, such as short shakes, mordents, beats (short appoggiature from below or above), and the slur or slide, they employ a stenographic sign--which amounts to no more than one or two little slanting lines drawn through the stem of the note, and of which the latter is the form most frequently met with." (Same,ix)

"These signs are, so far as the writer is aware, the earliest instances of a species of stenography employed to indicate ornaments in music for keyed instruments." (Same,ix)

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"Musical notation attempts to do far more than is ever undertaken by ordinary verbal typography, and for that reason is far more complicated in its characters and their varied applications. The problem of using its apparatus so as to communicate the intended meaning clearly and yet economically is not simple." Pratt, The question of musical editing- its theoretical aspects' (1913) MUSIC TEACHERS NATIONAL ASSOCIATION PROCEEDINGS 63.

"There is available an array of symbols and signs which the composer may use to indicate the varying fluctuations in tempo, grades of loudness and quality of tone, but usually the composer contents himself with a few general outline indications, such as ritardando, accellerando, crescendo, diminundo, forte, mezzo-forte, piano, sfz., etc." Becker, Musical demarcations and inflections (June 1934) 3 MUSICAL REVIEW No. 5,5.

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Music editing is a form of writing in
Nature of shorthand (Continued)

It is fundamental to any symbolized scheme of music that there should be at least a staff, a clef and some notes. To these essentials have been added numerous accessory marks and devices, such as the slur, the dot, the bar, the rest, to aid the reader to an easier and more felicitous understanding..." VENABLE, THE INTERPRETATION OF PIANO MUSIC (1913) 2.

"The notation used in writing music for the pianoforte might aptly be called musical shorthand. Often representing solely the simplest way of writing a musical thought, it may also include suggestions in regard to the manner of performance, and the complications and inadequacies of a notation addressing two senses, hearing and touch, and symbolical both of effects for the ear and of directions to fingers and foot, are among the difficulties with which the pianist contends. Sometimes the sound is more fully expressed by the musical characters than is the mode of execution, and sometimes vice versa, the rendition being the same in both cases. As a passage may therefore be notated in many different ways, a thorough and comprehensive knowledge of the language of music is essential in order to perceive from the context the true significance of every note." (Same,8)

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"It might be supposed that in music, with all its diacritical marks--f, p, sf, stacc., leg., rall., accel., and a dozen more--it would be easier to get the phrasing right than with words, which have no such marks. But written words have none because, however many they had, they would never be able to convey to paper the subtleties of the speaking voice. Music set to words dispenses with these marks on the whole, and when it is independent of them economises as far as possible, because otherwise it would soon look (as in some editions it does look) like a page of Conington's Virgil--four lines of text to forty of comment; only worse, because the comment has to be interwoven with the text, and that soon leads to much corruption and many various readings." Fox-Strangways, Phrasing (Jan. 1928) 9 MUSIC AND LETTERS No. 1,1.

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2. Editing of music is created by the intellectual labor and skill of an experienced and accomplished musician.

"Interpretive musical art is thus often genuinely creative in character. It is, admittedly, the art of elaboration and is therefore a creative process of lower order than that of the composer proper, but it is of great value and usefulness nevertheless and not to be lightly esteemed." REDFIELD, MUSIC: A SCIENCE AND AN ART (1928) 161.

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"Several positive signs of progress in the efficacy and new practical value of our methods of studying the piano are before us. This is an age of specialties. The American has made quite as intelligent and minute analysis of every element entering into the study of musical theory and practice, as regards harmony, rhythm, phrasing, dynamics, damper-pedal, esthetic and emotional qualities, artistic delivery, etc., as have been made elsewhere. In the line of making special studies of the player's physical training and the adaptability of his nerves and muscles, independent possibilities of the player's arms, wrists, knuckles, and fingers, as related to expressive playing and interpretation, as well as brilliant execution, we are doing work that has not been done elsewhere." Sherwood, American Music teaching (Jan. 1903) 21 THE ETUDE No. 1, 12.

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"A poem may have a perfectly different emotional effect on one man and on another. If that is true of words, how much more must it apply to music, and how much more, again, to words and music together. The combination of the two makes perhaps, the strongest emotional appeal that we know to the individual, and his response thereto depends on his temperament, intelligence and equipment. In no two men are these alike. Interpretation is, therefore, essentially individual." GREENE, INTERPRETATION IN SONG (1912) 2-3.

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Editing of music is created by the intellectual labor and skill of an experienced and accomplished musician, (Continued).

"Of the many men who have taken up the task of editing our standard etudes and concertos, how many, we are tempted to ask, have realized the responsibility they have thus assumed? How many, indeed, give a second thought to the peculiarly delicate nature of such work, its numerous difficulties, and, above all, to the grave effect on the student-world resulting from inefficiency and unsound judgment?" Lehmann, The responsibility of editing (Aug. 1904) 22 THE ETUDE No. 8, 330-1.

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"If we carefully examine the various editions of the great composers, we discover that editors greatly differ as to the choice of fingers for certain passages." Brower, The art of fingering (Mar. 1915) 20 THE MUSICIAN No. 3, 164.

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"The responsibilities of one who undertakes the editorship of the work of a deceased musician are many and serious; he is bound to present the text in its integrity, correcting of course any obvious clerical error, and where any point of ambiguity or doubt arises to call attention to it, and, if he please, suggest such an emendation as would appear in his judgment to carry out the intentions and exact meaning of the author." Cummings, The mutilation of a masterpiece (1903-1904) PROCEEDINGS OF THE MUSICAL ASSOCIATION, 113.

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3. Editing of music is useful, both in the study of a composition and in its rendition.

"If the beginner has been carefully taught to perceive that all the details of the printed page are signs denoting specific directions about phrasing qualifications, he should have no trouble in gradually assimilating phrasing knowledge. He will soon be acquiring definite musical speech." Bornschein, The Elements of phrasing (Oct. 1915) 20 THE MUSICIAN No. 10, 668.

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"Phrasing is fundamentally the same in music and in speech. The means, too, are the same in both. The difference is solely one of degree. Without phrasing, speech as well as music is unintelligible and inexpressive. Do not forget that both the intellect and the emotions are concerned. It is generally assumed that there are two means employed in phrasing, namely, Accentuation and Punctuation. These are certainly the most important, the least dispensable. But there is a third one which especially plays a part of immense consequence wherever emotion is involved, and that is Tempo, rate of movement. Observe attentively the speech of a good actor, reciter or orator, and you will easily notice these three factors: Accentuation, with varying force of certain words and syllables; Punctuation, by pauses of varying length; and Tempo, varying rate of movement, which movement may be steady or gradually quickening or slackening, and modified momentarily. The incorrect use of these factors obscures, alters and even destroys the intended meaning. In music we find the same--only, there these factors are much more developed, having a larger compass and an infinitely finer gradation." Niecks, What every student should know about phrasing. (Oct. 1916) 34 THE ETUDE No. 10, 705.

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"The nearest parallel in literature to an edited musical work is a copy of a poem as prepared for the use of a pupil in elocution who wishes to present the poem in public; or a drama as worked out by actors. One may read a poem

Editing of music is useful, etc.
(Continued).

inaudibly and understand it, but the voice of the reader or recitalist is far more eloquent; a drama may be read in the quiet of one's fireside, but the version of the master-actor on the stage is far superior." Baltzell, The question of musical editing--- its practical aspects (1913) MUSIC TEACHERS NATIONAL ASSOCIATION, 70-77.

"The principles underlying the different fingerings used in piano music merit much more attention than they often times receive, for upon the choice of a good or a poor fingering depends to a great extent the general effect of the passages that are played. It has repeatedly been the experience of the writer that when a poor fingering is used wrong notes are played, or that the tempo is too slow, or that wrong accents are given, or that the expression or tone quality suffers. But the slightest change in the fingering often effects a great improvement." Wilkes, How to devise natural fingerings (June 1914) 32 THE ETUDE 6, 417.

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"It is a paradoxical state of affairs which includes accurate pedalling as one of the chief factors in artistic pianoforte playing, and at the same time affords the student so little opportunity of gaining information upon the subject." LINDO, PEDALLING IN PIANOFORTE (1922) 4.

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"In his earlier stages it is necessary for the student to follow carefully the teacher's fingering of his pieces or the fingering marked by the editor, if he has a reliable edition. Such standard editions as Peters, Schirmer, Ditson, and Steingraber, enlist the services of the most competent teachers and artists to mark the fingering, which is therefore entirely reliable for the student to follow. It is only through careful regard for, and by thorough acquaintance with the methods of competent instructors that the student can acquire an insight of his own. So in his early stages he cannot be too careful to follow the fingering given him." Rackle, Principles of fingering (Oct. 1913) 18 THE MUSICIAN No. 10, 661.

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Editing of music is useful, etc.
(Continued).

"We go on reprinting editions of the great masters, with antiquated fingering, no phrasing and, in most cases, positively wrong pedal signs. Here in the United States one can begin to see daylight. A number of publishers are issuing reprints as well as the original works of American composers, edited with a care as to phrasing and accurate pedal signs which compare favorably with the work done by the best German editors." Weber, Phrasing and phrased editions (Sept., Oct. 1915) 3 THE MUSICIANS JOURNAL Nos. 5/6, 10.

"The understanding and practice of correct 'Phrasing' is of the greatest importance to all true lovers of music. Without it, melody is pointless and tasteless and harmony degenerates into mere tolerable noise." Note, On Fingering (May 1908) 19 THE STRAD No. 217, 13.

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"Take the case of the pianoforte teacher. Only one in a hundred pupils is capable of discovering how an unmarked piece should be played, of deciding tempi, dynamics, phrasing, etc., let alone fingering. If the teacher marks all these himself, it results in a lamentable expenditure of time. He is driven to seek editions which present old music in such a way that the average pupil is helped to interpret it." Whittaker, The Business of a musical editor (Dec. 1, 1932) 73 THE MUSICAL TIMES AND SINGING-CLASS No. 1078, 1074.

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"Almost any good standard instruction book for the cello has its exercises and scales correctly fingered, and if followed implicitly would keep the pupil from going far wrong..." Venuto, The Fingering of the violoncello (Aug. 1917) 35 THE ETUDE No. 8, 557.

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"There is a decided advantage in adding some practical printed fingering, some pedal indications, or a few

Editing of music is useful, etc.
(Continued).

illustrations of embellishments to compositions which are chiefly placed in the hands of pupils. Such an addition saves time in the lesson hour, is an aid in the home work of the student and can be well utilized for the establishment of good habits of playing." Faelten, Modern editing of pianoforte music and its encroachments on staff notation (Sept. 1899) 16 MUSIC No. 5, 433.

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"Musical notation has changed much during the centuries. If we published works composed before 1600 as they were written originally, few musicians would be able to use our edition.

"In order to make an edition intelligible to the musician of today, we must transcribe the music into the notation which is familiar to the modern singer and player. But an exact transcription would include notes of unusual value, measures of incredible length and no marks of expression to indicate how the music is to be performed; certainly few people would be able to use such an edition." David, Problems of editing old music, AMERICAN MUSICOLOGICAL SOCIETY PAPERS (1937) 24.

"We now come to the printed musical markings of the song, wherein the composer's interpretative intention is set forth. Yet song-makers of today--or even yesterday--are not so lavish in their use of these helpful interpretative devices as are and were the composers for instrumental compositions." Henley, Nuance, the soul of song (Oct. 1937) 55 ETUDE No. 10, 674-5.

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"In many of these compositions hardly any attempt is made to write correct bowings. I have in mind a series of arrangement from operas, which have been sold by the millon all over this country, which are so ridiculously deficient

Editing of music is useful, etc.
(Continued).

in the bowing marks and proper slurring, that it seems as if the publisher had given the job to the office boy, who daubed a lot of slur marks with mucilage and threw them at the page, leaving them to stick wherever they fell. Tons and tons of sheet music violin pieces, where the bowing is either not marked at all or marked incorrectly, are being sold every year, and as they fall for the most part into the hands of players who do not know how to correct them, the mischief which is caused is incalculable. I do not know of any one cause which holds back the progress of the violin art more than this one of badly marked violin music. However, there has been considerable improvement of late in this respect and our leading publishers are paying more attention to having their violin compositions edited by good violinists." Braine, The Importance of carefully edited Bowings (June 1914) 32 THE ETUDE No. 6, 464.

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"For us pianists the interest in the matter centers, of course, in the development of keyboard instruments. If we wish to trace the history of fingering, we must begin with the doings of our ancestors, the organists, who were the first to attempt the taming of ten unruly digits in the service of keyboard efficiency. A long cry it is from those dark days of fingering in the sixteenth century, when churchly musicians used fairly to pummel the keys of their instruments with their fists (the keys were some three to six inches broad, stubborn in proportion, and would yield to no other sort of treatment), to the time of our modern concert grand, with its finely-balanced mechanism, sensitively respondent to every slight impulse from the hand of the player. The gradual improvement in keyboard construction, and the increased technical ability demanded from performers by composers as the art advanced, were two factors which could not but bring about a corresponding development in fingering." Hughes, Fingering at the pianoforte (May 1917) 22 THE MUSICIAN No. 5, 336.

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